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INDEX OF CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-671

CECILIA ESPINOZA and RUDOLFO ESPINOZA, *Petitioners,*

v.

FARAH MANUFACTURING CO., INC., *Respondent.*

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

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MEMORANDUM FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

DECISION BELOW

The decision of the court of appeals (Pet. App. 1a-9a) is reported at 462 F.2d 1331, (5th Cir.). The decision of the district court (Pet. App. 10a-15a) is reported at 343 F.Supp. 1205.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1972. A petition for rehearing and rehearing en banc was denied on July 21, 1972. The petition for a writ of certiorari was filed on October 31, 1972, and was granted on April 23, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employer's refusal to hire a lawful resident alien because that person is not a citizen violates the prohibition against discrimination on the basis of national origin contained in Section 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.

STATUTE INVOLVED

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) provides in pertinent part:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual . . . because of such individual's . . . national origin . . . .

STATEMENT

The petitioner is a lawfully admitted resident alien of Mexican birth living in San Antonio, Texas, with her citizen husband (R. 74-75, 76-77). In July, 1969, she was rejected by respondent Company for employment as a seamstress at its San Antonio division company solely because she was not a citizen (R. 79, 85-86). The Company's action was in conformity with its policy

of hiring only citizens (R. 37). Citizens of Mexican ancestry make up more than 92 percent of the Company's total employees, 96 percent of its San Antonio employees, and 97 percent of people doing the work for which petitioner applied (R. 37-38).

In a suit brought by petitioner in the Western District of Texas under Title VII, the district court granted petitioner's motion for summary judgment, holding that the Company's refusal to hire her because she was not a citizen constituted discrimination on account of "national origin" within the meaning of Section 703(a) of Title VII, 343 F.Supp. 1205 (R. 69; Pet. App. 10a-15a).

The court of appeals reversed holding that Title VII does not prohibit discrimination against resident aliens except "where such a practice is symptomatic of or a necessary element within prohibited national origin discrimination, or where it is a mere pretense to camouflage national origin discrimination." 462 F.2d 1331, 1334 (Pet. App. 1a-9a). "National origin," the court below stated, should not be read to include citizenship; rather "national origin means exactly and only that," at 1332.

ARGUMENT

DISCRIMINATION IN EMPLOYMENT ON THE GROUND OF ALIENAGE IS DISCRIMINATION BASED ON NATIONAL ORIGIN, FORBIDDEN BY TITLE VII.

A. The E.E.O.C. Guidelines are a Proper Interpretation of the Statute.

Congress has stated in Title VII that private employers subject to the Act may not discriminate against an individual because of the country from which that person came. Section 703(a)(1) provides that it is unlawful to fail to hire "any individual" because of

"national origin". In implementation of that provision the Equal Employment Opportunity Commission, the agency charged by Congress with primary responsibility for the implementation and enforcement of Title VII, has issued guidelines which state (29 C.F.R. 1606.1(d)):[1]

> Because discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin, a lawfully immigrated alien who is domiciled or residing in this country may not be discriminated against on the basis of his citizenship, except that it is not an unlawful employment practice for an employer, pursuant to section 703(g), to refuse to employ any person who does not fulfill the requirements imposed in the interests of national security pursuant to any statute of the United States or any Executive order of the President respecting the particular position or the particular premises in question.

This is a reasonable interpretation of the statute which is entitled to great weight. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434. Since under the Fourteenth Amendment all persons born in the United States are citizens—a status which is nearly indefeasible[2]—the status of being an alien arises from the fact that an individual was not born in this country but came from elsewhere. To refuse to hire an individual because such person is an alien is therefore to disadvantage that person because of the country of his birth, *i.e.*, a country other than the United States.

While persons born in this country automatically obtain citizenship at birth, individuals born elsewhere

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[1] 35 Fed. Reg. 421 (January 13, 1970)

[2] See *Afroyim v. Rusk*, 387 U.S. 253.

can acquire citizenship only through a long and sometimes difficult process. Among the requirements for naturalization are an extended residency period of from three to five years, 8 U.S.C. 1427(a) and 1430 (see 8 C.F.R. 316a); a demonstration of the ability to read, write and speak English, 8 U.S.C. 1423(1) (see 8 C.F.R. 312.1); and a demonstration of "a knowledge of the fundamentals of history, and of the principles and form of the government of the United States," 8 U.S.C. 1423(2) (see 8 C.F.R. 312.2). The Company's citizenship requirement thus creates two different and unequal standards for employment: the native born are automatically eligible for employment while those born elsewhere are eligible for employment only after they have completed the requirement period of residency and passed the proficiency tests in English and civics. If this Company's policies were followed generally, lawfully resident aliens would be under an absolute bar to employment for the three to five year period during which a resident alien is not eligible for naturalization because of the residency requirement. In other words a group of employees is being deprived of the opportunity for employment for the sole reason that they were born outside the United States and have not obtained citizenship. That is discrimination based on birth outside the United States and is thus discrimination based on national origin in violation of Title VII.

As shown by its reference to the fact that there was no claim that respondent used the citizenship requirement as a camouflage, the decision of the court of appeals was influenced by its view that respondent has a pro-citizen rather than an anti-alien intent. But so long as the effect of respondent's practice is discriminatory, intent is immaterial. *Griggs* v. *Duke Power*

Co., 401 U.S. 424, 432. It is therefore not significant that respondent does not refuse to hire naturalized citizens who have the same birthplace as the petitioner resident alien. She, as an individual, is being subjected to employment discrimination because of her birth outside the United States. Thus she, as an individual, and others in her class suffer discrimination in employment based on their national origin.

An employer may not impose discriminatory conditions on a class protected by Title VII merely because there are other members of the class who are not directly affected by such conditions. In *Phillips* v. *Martin Marietta*, 400 U.S. 542, this Court rejected the defendant's argument that it could refuse to employ mothers with pre-school children, although employing fathers with such children, because a large majority of applicants hired for the position sought by the plaintiff were women. It held that Title VII "requires that [all] persons of like qualifications be given employment opportunities irrespective of their sex." 400 U.S. at 544. See also *Lansdale* v. *United Airlines*, 437 F.2d 454 (5th Cir.); *Sprogis* v. *United Air Lines*, 444 F.2d 1194 (7th Cir.), *certiorari denied*, 404 U.S. 991. Similarly here, each individual applicant has the right, under Title VII, not to be subject to discrimination based on his or her individual status as a person born outside the United States.

B. The E.E.O.C. Guidelines Interpret the Statute in a Manner Consistent with the Purpose of the Statute to Accord to Individuals The Right to be Free from Discrimination in Private Employment Similar to the Rights Protected by the Fourteenth Amendment Against Infringement by the States.

Even if it be assumed that the term "national origin", as used in Title VII is unclear, it is reasonable to interpret any ambiguity in the statute in a way which accords with its fundamental purpose. *United States* v. *Baco-Unidisk,* 394 U.S. 784, 799; *Perry* v. *Commerce Loan Co.,* 383 U.S. 392, 399-400.

The fundamental purpose of Title VII is to assure that every person has the chance to seek and secure employment without discrimination. As the Fifth Circuit said in one of the earliest Title VII cases, "The ethic which permeates the American dream is that a person may advance as far as his [or her] talents and . . . merit will carry him." *Miller* v. *International Paper Co.,* 408 F.2d 283, 294, (5th Cir.). As the district court stated in the instant case at 1207 (Pet. App. 13a):

> By 42 U.S.C. § 2000e-2(a)(1) Congress meant to prohibit all invidious employment discrimination on the basis of national origin, including national ancestry, ethnic heritage, nationality and citizenship.

This Court has recently reiterated,[3] in resounding terms, the right under the Fourteenth Amendment of lawfully resident aliens to be free from discrimination in state employment on account of alienage. *Sugarman* v. *Dougall,* — U.S. —, No. 71-1222, decided June

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[3] For earlier decisions to the same effect, see *Graham* v. *Richardson,* 403 U.S. 365; *Takahashi* v. *Fish & Game Commission,* 334 U.S. 410.

25, 1973; See also *In Re Griffiths*, —— U.S. ——, No. 71-1336, decided June 25, 1973. In the latter case, the Court quoted Mr. Chief Justice Hughes in *Truax* v. *Raich*, 239 U.S. 33, 41:

> It requires no argument to show that the right to work for a living in the common occupations of of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure. [Citations omitted.] If this could be refused solely upon the ground of race or nationality, the prohibition of the denal to any person of the equal protection of the laws would be a barren form of words.

The use of that quotation, dealing with race and nationality, in the context of a decision dealing with denial of rights on the basis of alienage, indicates the interrelationship between nationality and alienage. Title VII is properly interpreted to reflect that relationship.

In a prior memorandum submitted by the United States in this matter, it was pointed out that Congress had, in other contexts, apparently interpreted the term "national origin" as not including alienage since by executive order beginning in 1943,[4] and by Act of Congress since 1964,[5] the federal government has been prohibited from discriminating on the basis of "national origin" even though, by the requirements of the Civil

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[4] Exec. Order 9346, 8 Fed. Reg. 7183 (1943); Exec. Order 10308, 16 Fed. Reg. 12303 (1951); Exec. Order 10479, 18 Fed. Reg. 4899 (1953); Exec. Order 10925, 26 Fed. Reg. 1977 (1961); Exec. Order 11246, 30 Fed. Reg. 12319 (1965); Exec. Order 11478, 34 Fed. Reg. 12985 (1969).

[5] 5 U.S.C. 7151, originally enacted as Section 701(b) of Title VII of the Civil Rights Act of 1964.

Service Commission since 1914 [6] and in various appropriation acts, non-citizens were made ineligible for service in the federal competitive system. In light of the *Sugarman* and *Griffths* decisions, however, it is evident that the citizenship requirement for federal service must be evaluated in terms of the special justification of the federal government to have only citizens as employees—a question on which the Court specifically declined to rule in the *Sugarman* case. Title VII also recognizes that there are situations in which citizenship may legitimately be a *bona fide* occupational qualification for employment. Section 703(e) of Title VII, 42 U.S.C. § 2000e-2(e), provides in pertinent part:

> Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of their . . . national origin in those certain instances where . . . national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .

We therefore have come to the conclusion that discrimination on the basis of alienage should properly be deemed, as the E.E.O.C. guidelines direct, to effectuate discrimination on the basis of national origin unless a *bona fide* occupational qualification is shown. No such *bona fide* qualification exists for the position of seamstress here involved.

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[6] 5 C.F.R. 338.101.

C. Nothing in the Legislative History of the Statute Negates the Interpretation of the Statute Adopted by the E.E.O.C. Guidelines.

In view of the fact that the interpretation of the term "national origin" adopted by the E.E.O.C. guidelines accords with the natural meaning of the term and with the underlying purpose of the statute, that interpretation should be followed unless a contrary Congressional intent is apparent. We have already discussed the fact that a contrary intent cannot be read into the requirement of citizenship for federal employment since the justification for that policy must rest on the need for citizenship as a condition for federal employment, a consideration which does not pertain in this case. Beyond that, there is nothing in the legislative history of Title VII which would militate against the interpretation adopted in the E.E.O.C. guidelines.

The single direct definition given to "national origin" in the history of the Act—the remarks of Congressman Roosevelt, 110 Cong. Rec. 2548-2549 (1964)—to which the court below refers (Pet. App. 4a), furnishes no support for the Court's reading of the Act. Congressman Roosevelt said that national origin "means the country from which you *or* your forebears came from."[7] (Emphasis supplied.) Since, as we have shown, discrimination against resident aliens is discrimination against those who have come from another country, this statement tends to support rather than negate the validity of EEOC's guideline. It is true that the words "or ancestry" appearing in the original bill were eliminated from the bill as submitted by the House Judiciary Com-

[7] Congressman Roosevelt's statement concerning the term "national origin" arose in the context of a discussion in which he was distinguishing discrimination based on race from discrimination based on national origin.

mittee. There was no discussion regarding the reason for this deletion except for the House Judiciary Committee Minority Report [8] which states:

> There is no material change in the substantive provisions of this title and its predecessor title defining 'unlawful employment practice.' Hence the general coverage of both versions is the same.

It is entirely consistent with the report to assume that the reason for the deletion was the broad scope of the term "national origin" which encompasses ancestry. As we have discussed above, discrimination against noncitizens is discrimination against persons born outside the United States. It is therefore discrimination based on national origin.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed and the judgment of the district court should be reinstated.

Respectfully submitted,

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[8] H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963), 2 U.S. Code Cong. & Ad. News 2445 (1964).

Affidavit of Service

I hereby certify that on October 5, 1973, three copies of the foregoing Motion for the Equal Employment Opportunity Commisson For Leave to File a Memorandum as *Amicus Curiae* and Accompanying Memorandum were mailed, postage prepaid and special delivery, to the following counsel of record:

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I further certify that all parties required to be served have been served.

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